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No. 71-717

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1971

SUPREME COURT, U. S.

JOSEPH KROZAK, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having committed perjury before a grand jury, in violation of 16 U.S.C. 1621. He was sentenced to five years' imprisonment. The court of appeals affirmed without opinion (Pet. 3a).

The indictment alleged that petitioner had lied to the grand jury when he testified that he had not given any money, and had no knowledge of any funds having been given, to city and state employees on behalf of his company, Professional Health Services, Inc. Professional Health Services, through its subsidiary, Rugby Fund-

ing, purchased at discount accounts receivable which were payable by New York counties and municipalities to providers of medical services under Medicaid (Tr. 168, 172, 367-368).[1]

At trial three New York city employees and one county employee testified to having received (prior to petitioner's grand jury testimony) cash either from petitioner directly or from one Sylvia Diaz, on behalf of Rugby Funding. According to their testimony, the money was paid in order to expedite payment of checks to Rugby Funding (Tr. 196, 232, 234, 258-259, 288, 322). When he took the stand at his trial, petitioner admitted having made payments, through Sylvia Diaz, to three of these employees (Tr. 416-417, 455-456). His defense was that he thought the grand jury was interested in "bigger fish" (Tr. 422).

1. Petitioner contends that the proof did not satisfy the "two-witness" rule[2] which the court properly explained in its charge (Tr. 571-573). The evidence of perjury was, however, overwhelming and clearly met the requirements of the rule. Sylvia Diaz' testimony that she had received cash from petitioner to distribute to city employees was corroborated by these employees and admitted by petitioner (Tr. 107, 109-110, 112-113, 165-166, 196, 232, 234, 258-259, 288, 417, 455-456). Corroborating evidence does not have to be identical in every respect. Furthermore, petitioner admitted giving money directly to at least one city employee (Tr. 457).

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[1] Tr. references are to the transcript of the trial in the district court, a copy of which we are lodging with the Clerk.

[2] *See Weiler v. United States*, 323 U.S. 606.

2. Petitioner also contends that the question of materiality should have been submitted to the jury. It is well settled, however, that the issue of materiality in a perjury prosecution is for the court. *E.g., Sinclair* v. *United States*, 279 U.S. 263, 298; *United States* v. *Stone*, 429 F. 2d 138 (C.A. 2); *Vitello* v. *United States*, 425 F. 2d 416 (C.A. 9), certiorari denied, 400 U.S. 822.[3]

3. Petitioner contends that his five-year sentence was improper since the district judge stated at one point that she has always imposed the maximum in perjury cases (Tr. 629-630). However, the underlying facts as to petitioner's repeated bribery of city and county officials clearly warranted the sentence imposed. We note that the trial judge indicated a willingness to consider a motion to reduce sentence, contingent on petitioner's cooperation in the government investigation (Tr. 620), thus suggesting that, given extenuating circumstances, the trial judge might impose a shorter sentence for perjury.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

JANUARY 1972.

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[3] Petitioner's reliance on *Barnes* v. *United States*, 378 F. 2d 646 (C.A. 5), is misplaced, since the court there specifically held that the trial judge had erred in submitting the issue of materiality to the jury. *Id.* at 650.

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